Supreme Court, U.S.
FILED

95-642 JUL 25 1995

OFFICE OF THE CLERK

CAUSE NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

_____ 1995 TERM

FRED A. FRIEND,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. BRACKER
501 S Main St.
Suite. 203, Kiel Building
Council Bluffs, Iowa 51503
Telephone No. (712) 322-4215

90 pp

QUESTIONS PRESENTED FOR REVIEW

IN A CONSPIRACY, MUST THE ELEMENT OF FORESEEABILITY OF USE OF A FIREARM BY A CO-CONSPIRATOR BE PROVEN, BY ACTUAL EVIDENCE PRESENTED BY THE GOVERNMENT, BEYOND A REASONABLE DOUBT?

A. DID THE USE OF THE WORD "COULD" IN THE STANDARD EIGHTH CIRCUIT JURY INSTRUCTION READ TO FRED FRIEND'S JURY ALLOW THE JURY TO CONVICT FRIEND ON LESS THAN PROOF BEYOND A REASONABLE DOUBT?

B. DOES THE WIDESPREAD APPLICATION OF THE PINKERTON DOCTRINE TO FIREARMS CHARGES DENY DEFENDANTS DUE PROCESS?

C. MAY THE CIRCUIT COURTS OF APPEAL TAKE JUDICIAL NOTICE OF THE FORESEEABILITY OF WEAPONS IN LARGE DRUG CASES?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner Fred A. Friend was indicted on 9 drug trafficking and related charges. William C. Bracker represented Mr. Friend in the United States District Court and on appeal in the United States Court of Appeals for the Eighth Circuit.

Prior to Friend's indictment, in a related prosecution, eleven other persons were indicted on 29 drug trafficking and related charges. Those persons are Gary Apker, Kenneth D. Lucht, Cheryl Morford, Lovella Mauseth, Sandra Volkir, Rodney Rumsey, Dale Haley, Mary Lee, and Robert Farrell. Gary Apker pled guilty to a one count information charging him with a violation of 18 U.S.C. §924(c)(2).

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

Table of Contents

Page

QUESTIONS PRESENTED FOR REVIEW ii

LIST OF ALL PARTIES TO THE PROCEEDING iii

REFERENCES TO THE OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS viii

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES . . 2

STATEMENT OF THE CASE 3

ARGUMENT FOR THE GRANTING OF THE WRIT 8

A. The word "could" in the jury instruction given to Fred Friend's jury allowed the jury to convict Friend of the firearm count applying a standard less than beyond a reasonable doubt 8

B. The unchecked application of the Pinkerton doctrine in cases where the defendant's relationship to the weapon is minimal denies such defendant due process 11

C. When reviewing the sufficiency of evidence for a § 924 (c) conviction, the United States Courts of Appeals may not take judicial notice of the forseeability of weapons in large drug cases, but must require the prosecution to present evidence which proves the element of foreseeability beyond a reasonable doubt 15

CONCLUSION. 29

Table of Authorities

Cases: **Page**

U.S. v. Aeschbacher, 937 F.2d 617, (10th Cir. 1991). 25

United States v. Alvarez, 755 F.2d 830, 850-51 (11th Cir.), cert. denied, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985) 11, 12

Unites States v. Apker, 962 F.2d 12 (8th Cir. 1992) viii

United States v. Apker, 18 F.3d 541 (8th Cir. 1994) viii

United States v. Blitz, 533 F.2d 1329 (2d Cir. 1975) cert. denied, 429 U.S. 819, 97 S.Ct. 65, 50 L.Ed.2d 79 (1976) . 13

U.S. v. Castaneda, 9 F.3d 761 (9th Cir.1993), cert denied, 114 S.Ct. 1564 (1994) 11, 21

United States v. Chorman, 910 F.2d 102 (4th Cir.1990) . . . 11

United States v. Christian, 942 F.2d 363 (6th Cir.1991) cert. denied, --- U.S. ----, 112 S.Ct. 905, 116 L.Ed.2d 806 (1992) 11

United States v. Diaz, 864 F.2d 544 (7th Cir.1988),cert. denied, 490 U.S. 1070, 109 S.Ct. 2075, 104 L.Ed.2d 639 (1989) 23, 25

United States v. Edwards, 36 F. 3d 639 (7th Cir. 1994) . . . 22

United States v. Friend, 50 F.3d 548, (8th Cir. 1995) . viii, 29

United States v. Gutierrez, 978 F.2d 1463 (7th Cir.1992) . 22

United States v. Gonzalez, 918 F.2d 1129 (3rd Cir. 1990), cert denied, 498 U.S.1107, 111 S.Ct. 1015, 112 L.Ed.2d 1097 (1991) 12, 27

United States v. Johnson, 886 F.2d 1120 (9th Cir. 1989) . . 12

United States v. Jones, 990 F.2d 1047 (8th Cir. 1993), cert denied 114 S.Ct. 699 (1994) 24

United States v. Lucas, 932 F.2d 1210 (8th Cir. 1991) 9

United States v. Moreno, 588 F.2d 490, 493 (5th Cir.), cert. denied. 441 U.S. 936, 99 S.Ct. 2061, 60 L.Ed.2d 666(1979)11

U.S. v. Odom, 13 F.3d 949 (6th Cir. 1994) 24

United States v. Pinkerton, 328 U.S. 640, 648, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946) 8, 22, 24, 25

United States v. Romero, 897 F.2d 47, (2nd Cir. 1990) . . . 26

Unites States v. Williams, 31 F.3d 522 (7th Cir, 1994) . . . 23

Statutes:

18 U.S.C. §924(c)(2) . . . . . iii, 11, 12, 13, 14, 15, 26

28 U.S.C. §1254(a) 1

Rules:

S.Ct.R. 10 1

REFERENCES TO THE OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS

United States v. Fred D. Friend, No. 94-2263, 50 F.3d 548, (8th Cir. 1995) (This case is related to the case of United States v. Apker, 18 F.3d 541 (8th Cir. 1994) and Unites States v. Apker, 962 F.2d 12 (8th Cir. 1992).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

i. Date of judgment sought to be reviewed: Submitted November 15, 1994. Decided March 15, 1995.

ii. Dates of any order regarding rehearing: April 25, 1995

iii. Cross-Petition: None

iv. Statutory provision believed to confer jurisdiction:

This Petition involves Petitioner's right to Due Process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, based on the sufficiency of evidence and the Defendant's right to require the government to prove each element of each charge against him beyond a reasonable doubt. The issues were preserved at trial before Judge William Cambridge, presiding over the United States District Court of Nebraska, raised on appeal before the United States Court of Appeals for the Eighth Circuit, and partially denied by that Court on March 15, 1995. The United States Court of Appeals for the Eighth Circuit denied a rehearing and suggestion for rehearing en banc on April 25, 1995. Therefore, this Court has statutory Authority to consider this Petition for a Writ of Certiorari 28 U.S.C. §1254(a) and S.Ct.R. 10.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

i. Constitutional Provisions:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, Liberty, or property, without due process of Law; nor deny to any person within its jurisdiction the equal protection of the laws. United States Constitution, Fourteenth Amendment.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS:

The investigation of illegal distribution of methamphetamine began in earnest in April, 1989 with the installation of a pen register on the telephone of Gary Apker, a co-defendant of Appellant. Eventually, applications were approved to convert the pen register into a wiretap. With information overheard from the wiretap, applications were approved to install electronic listening devices within the house. The devices were installed August 3, 1990. (Tr. 313:18). Sixty-eight separate conversations were recorded spanning one hundred seventy-four separate cassette tapes. Special Agent Heideman listened to each of the conversations (Tr. 503:18). However, he never heard Gary or anyone else discuss or make reference to a silence or muffling device (Tr. 515:16-19; 258:15-19). No tapes were played for the jury which mentioned firearms of any sort. Officer Green, who also listened to most of the conversations testified that no one mentioned the silencer on the gun found in the hidden safe(Tr. 267:3-18). Additionally, in all the conversations, only one direct reference

to the hidden floor safe was made and that was made to a man named Bob from New York. In that conversation Gary Apker stated that, other than the man who installed the safe, no one else in the United States knew of the existence of the safe (Tr. 515:20-517:9).

During the execution of a search warrant at the residence of Gary Apker, Officer Ted Green searched the basement. Below the vanity in the bathroom of the basement, Officer Green found the hidden floor safe (Tr. 189:1-23). Below the hidden safe, Officer Green found another secret hiding area (Tr. 190:16-17). Inside the second hidden area Officer Green found many bags containing white powder and large amounts of cash (Tr.191:22-192:2). About halfway through the lower hidden area, Officer Green felt a triangular gun case (Tr. 255:4-7). Officer Green testified that, given the location of the gun case, even if someone were watching Apker retrieve something from the safe, the guncase would not be visible. The silencer itself was inside the gun case (Exhibit 10B was the silencer found inside Exhibit 10 Tr.192:3-8). Gary Apker could hardly design a more complete plan to avoid detection or foreseeability of the silencer. Officer Green was

caught by surprise when he found the gun and silencer despite have listened to most of the conversations and despite his extensive training in drug enforcement (Tr. 267:3-9).

The only other testimony regarding foreseeability of the firearm came through Officer Green, a police officer who participated in the search at Gary Apker's house. Officer Green testified that the firearm was found in the hidden area below the cylinder safe. The questions and answers at trial were as follows:

> Q. Would you, for the jury, more specifically describe where Exhibit 10, 10A, and 10B (the firearm, silencer and case) were found in the -- in the hiding area of the basement?
>
> A. When the cylinder safe slid over to the side, it revealed a large area down below it, and you had an actual visual -- you could see about a six-inch circle. You could see bags mounded up. And as I -- I started pulling out the bags one by one, and halfway through lifting out the ziplock bags and the nylon zipper bags, on the side of the side of the pile I located this, triangular bag here, and it was all piled together. There was no way you could tell exactly where it was in relationship to all the other bags piled in there.
>
> Q. Was it visible from outside the opening to the concealed area?
>
> A. No, it was not.
> (Tr. 195:21-196:11)

Later in the trial Officer Green provided the following testimony

regarding firearms and other weapons:

Q. Officer Green, I would like to refer you back to your training and experience and ask you if based on your training and experience in drug investigation, do you have an opinion on whether guns and drug trafficking are commonly associated?

A. Yes, they are.

Q. And what is that opinion?

A. Over 80 percent of the investigations involving narcotics reveal some type of weapons.

Q. Based on your training and experience, for what purpose do persons involved in drug trafficking possess firearms?

A. Through the investigations, the firearms were used as an intimidation factor. If narcotics were to change hands and payment wasn't received, there was a threat -- threat of force there. It may not be overtly. It may be just showing the weapon to someone wanting payment back.

Q. What other purposes, Officer Green?

A. It was also used through the information that we had received that no one would talk as to what was going on involving the investigations.

Q. Were guns used also to protect drugs and money?

A. Yes, they were.

Q. And is that common in drug trafficking?

A. Yes, it is.
(Tr. 201:2-202:1)

Especially interesting is what the officer did not say. When he provided his statistic that weapons were involved in over eighty percent of the investigations in which he had participated, he did not reveal how many of those weapons were firearms, and how many were knives, clubs, axes, or other weapons. The officer also did not indicate whether he had any information regarding firearms in this particular investigation. Also, the officer did not testify that guns are more prevalent in larger drug cases, or that information indicated that this would foreseeably be a large drug case.

Both Gary Apker and Fred Friend had prior felony convictions. A reasonable person would not predict that either of these men, suffering under their disability, would possess a firearm.

ARGUMENT FOR THE GRANTING OF THE WRIT

IN A CONSPIRACY, THE ELEMENT OF FORESEEABILITY OF USE OR POSSESSION OF A FIREARM BY A CO-CONSPIRATOR MUST BE PROVEN, BY ACTUAL EVIDENCE PRESENTED BY THE GOVERNMENT, BEYOND A REASONABLE DOUBT.

A. THE WORD "COULD" IN THE JURY INSTRUCTION GIVEN TO FRED FRIEND'S JURY ALLOWED THE JURY TO CONVICT FRIEND OF THE FIREARM COUNT APPLYING A STANDARD LESS THAN BEYOND A REASONABLE DOUBT.

In United States v. Pinkerton, 328 U.S. 640, 648, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946), the Supreme Court held that because the overt acts of one conspirator are attributable to all co-conspirators, the same or other acts in furtherance of the conspiracy are likewise attributable to the others for the purpose of holding them responsible for the substantive offenses. 328 U.S. at 647, 66 S.Ct. at 1184. An exception to this rule applies when the act was "merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." 328 U.S. at 647-48, 66 S.Ct. at 1184.

The Eighth Circuit has approved a jury instruction stating that a defendant could be found vicariously liable if he "could have reasonably foreseen that a firearm would be used to

assault someone as a necessary or natural consequence of the conspiracy." United States v. Lucas, 932 F.2d 1210, 1219 (8th Cir. 1991). Provided the word "could" is defined as "was able", Petitioner agrees that the instruction is consistent with the holding in Pinkerton. Petitioner objected to the use of the word "could" since it has more than one meaning. "Could" is the past tense of "can". Webster's New Collegiate Dictionary, 1981, defines the verb can as follows: (inter alia)"b: be physically or mentally able to <he can lift 200 pounds>" OR "c: may perhaps <do you think he can still be living>".

Petitioner's jury was instructed to convict him of the silencer-equipped firearm found in Gary Apker's house if they determined that possession of the silencer could have been reasonably foreseeable by Petitioner. If the jury applied the second, "may perhaps" definition, they did not determine whether the act of possession by Gary Apker was a necessary or natural consequence of the conspiracy. Rather, they simply concluded that with these drug cases, anything's possible--anything "may perhaps" happen.

Despite Petitioner's objections to the contrary, Judge Cambridge insisted on using the ambiguous language.

Petitioner asserts that the language used in the instruction may explain why the jury returned a verdict with virtually no evidence to support the foreseeability of a silencer-equipped firearm.

B. THE UNCHECKED APPLICATION OF THE PINKERTON DOCTRINE IN CASES WHERE THE DEFENDANT'S RELATIONSHIP TO THE WEAPON IS MINIMAL DENIES SUCH DEFENDANT DUE PROCESS.

Several circuits, recognize that due process constrains the application of Pinkerton where the relationship between the defendant and the substantive offense is slight. United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989); United States v. Chorman, 910 F.2d 102, 112 (4th Cir.1990); United States v. Moreno, 588 F.2d 490, 493 (5th Cir.), cert. denied, 441 U.S. 936, 99 S.Ct. 2061, 60 L.Ed.2d 666 (1979); United States v. Alvarez, 755 F.2d 830, 850-51 (11th Cir.), cert. denied, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985). See also United States v. Christian, 942 F.2d 363, 367 (6th Cir.1991) (recognizing limitation's existence in other circuits), cert. denied, --- U.S. ----, 112 S.Ct. 905, 116 L.Ed.2d 806 (1992). "The foreseeability concept underlying Pinkerton is also the main concern underlying a possible due process violation." Christian, 942 F.2d at 367. In U.S. v. Castaneda, 9 F.3d 761 (9th Cir.1993) the Court of Appeals reversed a conviction under Sec. 924(c) where the defendants

actions were sufficiently removed from the predicate acts of the conspiracy. They held that although "courts recognize the nexus between drugs and firearms, United States v. Johnson, 886 F.2d 1120, 1123, there is no presumption of foreseeability, United States v. Gonzalez, 918 F.2d 1129,1136 (3rd Cir. 1990, cert denied, 498 U.S.1107, 111 S.Ct. 1015, 112 L.Ed.2d 1097 (1991), and the burden of proving foreseeability remains on the government, id. Where a defendant has little or no connection to the predicate drug offense, another conspirator's use of a firearm in relation to the predicate drug offense may, in some fact situations, be unforeseeable. In those cases, it would violate due process to find the defendant vicariously liable for the firearm's use under Sec. 924(c)." Id. 9 F.3rd at 767.

In one of the earlier cases adopting Pinkerton to uphold the conviction of co-conspirators, the 11th Circuit warned that Pinkerton would only apply in the case of conspirators who played more than a "minor" role in the conspiracy, or who had actual knowledge of at least some of the circumstances and events culminating in the reasonably foreseeable but originally unintended substantive crime. U.S. v. Alvarez, 755 F.2d 830

(11th Cir. 1985). They also noted the observations of Judge Mansfield in his dissent in United States v. Blitz, 533 F.2d 1329, 1346-47 (2d Cir.) (Mansfield, J., dissenting) (citations omitted), cert. denied, 429 U.S. 819, 97 S.Ct. 65, 50 L.Ed.2d 79 (1976):

> [I]t seems to me to place an undue strain on the concept to reason that, once a general conspiracy is shown, a minor or subordinate member who commits some act in furtherance of it thereby becomes an aider and abettor of parallel conduct of which he was unaware on the part of another member whose existence is unknown to him, merely because he should have reasonably foreseen that his conduct might assist others to commit such acts. Although such a foreseeability test might provide a basis for tort liability, the relationship strikes me as too attenuated to support a criminal conviction on the theory of aiding and abetting.

In the Apker conspiracy, the act of possession of a firearm was also sufficiently removed from the offense of distribution of methamphetamine to have not been foreseeable by a relative new-comer like friend absent some special knowledge. The Pinkerton issue is often raised in the Court of Appeals. The Courts of Appeals regularly affirm the §924(c) conviction since guns are common in the drug business, but most Circuits require evidence which proves foreseeability specific to the individual charged with the §924(c) violation.

Inherent in the violation of §924(c) are several levels of "use" of the firearm. The gun may be cocked and pointed at someone to collect a debt. The gun may be displayed on the wall in the room where a "front" transaction goes down as a subtle reminder to make timely payment. A dealer may frequently display the weapon to discourage a potential thief. Or the gun may be secretly available to protect the cache of drugs and money. At Friend's trial, the government presented no evidence that any of the co-Conspirators participated in any of the foregoing activities.

As the level of use becomes less notorious, foreseeability of such use decreases. Eventually, as in the instant case, the connection between the conspiracy and the weapon stretches so thin that a conviction under a Pinkerton instruction violates the Defendant's right to due process.

To convict Friend on the basis of the Eighth Circuit Court of Appeals exposure to drug cases, and not on the basis of the evidence presented to the Jury, violates Friend's right to Due Process.

C. WHEN REVIEWING THE SUFFICIENCY OF EVIDENCE FOR A §924(c) CONVICTION, THE UNITED STATES COURTS OF APPEALS MAY NOT TAKE JUDICIAL NOTICE OF THE FORESEEABILITY OF WEAPONS IN LARGE DRUG CASES, BUT MUST REQUIRE THE PROSECUTION TO PRESENT EVIDENCE WHICH PROVES THE ELEMENT OF FORESEEABILITY BEYOND A REASONABLE DOUBT.

Some Circuit Courts of Appeals still require that the government present sufficient evidence at the trial to prove that the defendant charged with the §924(c) violation was able to foresee the use of a firearm by a co-conspirator. However, the trend has been to impute foreseeability if the drug distribution conspiracy is substantial.

§924(c) enhances the penalties a drug dealer faces if he uses a firearm in relation to his drug trafficking offense. A conviction carries at least sixty months imprisonment which must be served consecutively to any other offense. Congress passed the law to discourage the prolific firearms in drug deals. Selling drugs is one crime, and those convicted will be punished. Carrying guns in relation to selling drugs is a more serious offense and those convicted will be punished more severely.

At some point, if the law has any effect, criminals who

still violate the law will do so without carrying firearms. The purpose of the law is to deter drug dealers from carrying weapons. Similarly the "school zone" penalty enhancement of Title 21 §860 is designed to deter dealers from selling drugs to children as they leave school.

The laws designed to directly deter behavior have not been kept secret. As individuals receive the sentence enhancements, their friends, relatives and (unindicted) co-conspirators become aware of the consequences. Eventually, the laws should have a deterrent effect. Some people will continue to risk arrest to enjoy the lucrative profits of the illegal drug trade. However, eventually many of those will modify their operation to cut their risk of loss. Eventually, the country should experience a deterioration of the "nexus between drugs and guns" That time certainly could already be upon us.

In Fred Friend's case, the United States Court of Appeals for the Eighth Circuit found that the record failed to establish sufficient evidence to establish that Friend reasonably could have foreseen Apker's use of the silencer-equipped firearm. They determined that "[t]here was no proof whatsoever on this issue" (Ruling dated March 15, 1995, A - 16). They concluded

that the weapon had been hidden in a place which Friend could not have known existed. "The police officers who discovered the well-hidden firearm testified that they were surprised to find it equipped with a silencer. There was simply no evidence that Friend had actual knowledge of any firearm in Apker's house, much less a firearm equipped with a silencer" (A - 16). They concluded that "there was a total absence of proof that Apker's silencer could have been reasonably foreseen by Friend" (A - 16).

Despite these observations, the Eighth Circuit determined that the weapon itself was foreseeable. They reviewed the evidence and determined that the pound of methamphetamine packaged similar to other drugs found in Apker's home established a buyer-seller relationship. This alone would not provide the requisite proof to establish foreseeability of a firearm. The Circuit then relied on a audio tape which the government asserted recorded a conversation between Apker and Friend. Judge Loken, writing on behalf of the three-judge panel, concluded that the conversation established that Friend's position was "well inside the periphery of the conspiracy, in a position to know the violent nature of the business and

therefore the likelihood that a major supplier like Apker would have a stash of drugs and proceeds protected by a firearm" (A - 15). Why couldn't Friend's position within the conspiracy have been such that he knew that guns substantially enhanced the potential penalties, and therefore relied on all co-conspirators to avoid guns like the plague.

Examine the conversation relied upon by the reviewing Court to provide evidence of foreseeablity of a weapon, which appeared in the trial transcript at page 441 through 495 (Appendix 18-53). Viewed in the light most favorable to the government, the transcript does provide some insight into the relationship between these two players. Gary Apker complains about people who owe him money (A - 26,27). He complains about having to work so hard to supply others with drugs (A - 52,53). He talks about helping people from other parts of the country (A - 19). He complains that he has to spend his own money because others wouldn't help him deliver cash (A- 19,21). He complains about the difficulties in sending cash (A - 30). He complains about being broke (A - 27). In fact, Apker tells Friend that he is so poor that he had to sell his Police Special Harley-Davidson motor cycle and had to borrow ten

thousand dollars against another motor cycle.

The relationship these men had seemed to be built on Apker seeking Friend's sympathy or pity. They lacked any real intimacy. Friend clearly was not an equal partner of Apker's. He had just moved out from Ohio. Friend mentioned the difficulties of starting over (A - 29,30). This corroborated Agent Heideman's testimony that Friend had first been spotted in Omaha several weeks prior to the execution of the search warrant, and the registration of Friend's automobiles in Ohio. Friend was an outsider. Gary talked in general terms and discussed others in the conspiracy, but only those who were Hells Angels (Corky Haley and Lamont Kress). The conversation never included mention of Kenneth D. Lucht, Cheryl Morford, Lovella Mauseth, Sandra Volkir, Rodney Rumsey, Mary Lee, Robert Farrell, or Timothy Egan. For some reason, Gary Apker felt the need to hide the identity of the persons he dealt with so much more regularly.

Gary also withheld information about the drugs he had and his cache of money. Gary complained of being broke. He told Friend he was selling assets and borrowing money to survive, while he had $225,000.00 in cash hidden near the

gun.

Missing from the lengthy conversation is any reference to guns, violence, intimidation, need for protection, or witness silencing, that the Circuit Court inferred from the conversation. At one point, Friend indicated that Murph owed him money but still bought a new bike. Neither conversant indicated that Murph should be shot or intimidated with a firearm. Later in the conversation, Friend laments being taken advantage of by Jimmy, who was described as greedy. Friend had to sell everything to make up for Jimmy's bad deal, but again, the conversation did not imply the use of a firearm. Apker complained about a number of people who owed him money. Never did Apker suggest that he needed to use a weapon to encourage repayment. Although they talked about improving the quality of their stashed by grinding and freezing, the two never mentioned the need to protect the product.

Apker had been the subject of an extensive criminal investigation. A listening device had been placed in his home. The devices were installed August 3, 1990. (Tr. 313:18). Sixty-eight separate conversations were recorded spanning one hundred seventy-four separate cassette tapes. The government

had the opportunity to get inside Apker's most personal relationships. They listened to every conversation he had inside his home. This investigation exceeded the ordinary wiretap, where some criminals guard their conversations or use code words. The government had access to any remark made by Apker or any of his co-conspirators in the weeks prior to the arrests. The jury didn't have guess or speculate or infer what the co-conspirators discussed. Any damaging conversation could be played for them. Any reference to firearms or violence could have been played to the jury. The jury heard none. None of the agents on the case testified about a single act of violence. The only evidence of a firearm involved the silencer-equipped Ruger .22 hidden beneath the floor safe.

The Circuit Court ruled that "there is no presumption of foreseeability." (A - 13) citing United States v. Castaneda, 9 F.3d 761, 767 (9th Cir. 1993), cert denied, 114 S.Ct. 1564 (1994). They state that the government must prove the criminal conduct beyond a reasonably doubt. "In this context, that means proof that Friend's knowledge of and role in the conspiracy was such that he could reasonably have foreseen Apker's use of the firearm. [Their] prior cases dealing with this

issue have all required this type of defendant-specific proof" (Id.).

However, having stated that, the Court then made the giant leap from "defendant-specific proof" to the general conclusion that a major supplier like Apker would have a firearm to protect his stash, and that Friend somehow had knowledge of some fact that would lead him to foresee the existence and use of such a firearm. The Eighth Circuit ruling seems to hold that foreseeability will in fact be presumed where a substantial conspiracy has been established.

The Seventh Circuit has openly adopted the standard which the Eighth Circuit explicitly rejects but tacitly adopts. In United States v. Edwards, 36 F. 3d 639 at 644 (7th Cir. 1994), the Court states:

> In Pinkerton v. United States, 328 U.S. 640, 647, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946), the Supreme Court held that an act in furtherance of a conspiracy may be attributed to all co-conspirators regardless of whether those conspirators participated in the act. If, however, the act is one which "could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement," the nonparticipating co-conspirators cannot be held responsible. Id. at 648, 66 S.Ct. at 1184. We have held that the inherently violent nature of the drug trade makes the presence of firearms in large transactions reasonably foreseeable. United States v. Gutierrez, 978 F.2d 1463, 1468 (7th

> Cir.1992); United States v. Diaz, 864 F.2d 544, 549 (7th Cir.1988). Hence, in Gutierrez, it was permissible for the jury to attribute one conspirator's gun to another conspirator in a $60,000 cocaine transaction. Likewise in Diaz, which involved a $39,000 transaction, we upheld a conviction under 18 U.S.C. Sec. 924(c), because we found it foreseeable that a weapon would be carried.

The Seventh Circuit only requires the government to prove that more than $38,999.99 worth of drugs were involved and foreseeability of a firearm is to be presumed. In a separate Seventh Circuit case, Unites States v. Williams, 31 F.3d 522, at 526, (7th Cir, 1994), the Court concluded "[b]ecause the drug industry is , by nature, a violent business, the presence of firearms in transactions involving sizeable quantities of drugs is reasonably foreseeable."

By concluding that Friend could have foreseen the firearm in Apker's hidden safe because he was "inside the periphery of the conspiracy, in a position to know the violent nature of the business" the Eighth Circuit adopts the same relaxed standard.

In upholding Friend's conviction for the firearm count, the Eighth Circuit sent the message to prosecutors that Co-conspirators should be charged with every firearm found within

a drug conspiracy. The only requirement is the mention of "drugs" and the reviewing court will supply the requirement of violence and the presence of firearms to establish foreseeability. As the Court said on page 8 of their March 15 ruling, "we have repeatedly recognized "that drug traffickers typically keep firearms available to protect themselves and their drugs and drug money." United States v. Jones, 990 F.2d 1047, 1049 (8th Cir. 1993), cert denied 114 S.Ct. 699 (1994)". They educate the prosecutors that based on past cases reviewed by the Court of Appeals, the Court knows that guns are always foreseeable to a co-conspirator with a close relationship to a drug supplier. The Eighth Circuit has not even required evidence of the $39,000. Benchmark established by the Seventh Circuit.

The Sixth Circuit also seems to have shifted the burden regarding the element of foreseeability. In U.S. v. Odom, 13 F.3d 949 at 959(6th Cir. 1994) the Court stated:

> The nexus between drugs and firearms has been acknowledged when large quantities of cocaine are involved in a conspiracy. Pinkerton liability for a substantive offense may be imposed if the offense was reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. United States v. Pinkerton, 328 U.S. 640, 648, 66 S.Ct. 1180, 1184,

> 90 L.Ed. 1489 (1946). We agree with the court's observation in United States v. Diaz, 864 F.2d 544, 549 (7th Cir.1988), cert. denied, 490 U.S. 1070, 109 S.Ct. 2075, 104 L.Ed.2d 639 (1989), that "the illegal drug industry is ... a dangerous, violent business. When an individual conspires to take part in a street transaction involving a kilogram of cocaine worth $39,000, it certainly is quite reasonable to assume that a weapon of some kind would be carried."

The Court imputes foreseeability because of knowledge they have, independent of actual trial evidence. The government does not have to prove that a particular conspiracy is dangerous, or that particular co-conspirators would likely carry firearms. Since the Courts of Appeals have reviewed cases involving dangerous, violent drug dealers, violence is imputed to all drug dealers, apparently without further evidence.

Contrast this standard to the Tenth Circuit which seems to actually require "defendant-specific proof." In U.S. v. Aeschbacher, 937 F.2d 617, (10th Cir. 1991), the Court stated:

> In order to convict Gillis or Barkdoll under 18 U.S.C. Sec. 924(c)(1), the government was required to prove beyond a reasonable doubt that... that one of their co-conspirators committed this crime during and in furtherance of the conspiracy and that this act was a reasonably foreseeable consequence of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647-48.

In Aeschbacher, the government presented evidence

that two firearms were involved in the conspiracy. A co-conspirator testified that while traveling with Gillis and Barkdoll, between Glenrock and Gillette with the methamphetamine, he noticed a firearm under the seat of the vehicle. Barkdoll also admitted to agent Hughs that there was a firearm in the vehicle. The Co-Conspirator further testified that Gillis and Barkdoll were afraid that he was going to take the firearm and shoot Baumgardner. This evidence relates to the specific defendant rather than drug conspiracies in general.

Applying this standard to Friend's case would require reversal of the conviction, since the government failed to offer any "defendant-specific" evidence. The government simply presented no evidence that Friend knew either of a gun or of the necessity of one.

Similarly, the Second Circuit requires evidence of foreseeability and holds that the issue is a factual matter which the government must prove beyond a reasonable doubt. In United States v. Romero, 897 F.2d 47 (2nd Cir 1990), the court sustained the §924(c) conviction under a Pinkerton theory because the prosecution put on evidence that a large amount of ammunition was spread around in view of all Co-conspirators,

an armed triggerman was stationed in a closet, and counter-surveillance techniques were employed by the two defendants who vicariously received the gun charge.

In the Third Circuit, the Court of Appeals has also wrestled with the requirement of foreseeability. In Unites States v. Gonzalez, 918 F.2d 1129, at 1136 (3rd Cir. 1990), the Court declined to adopt the lead of the Seventh Circuit in Diaz, 864 F.2d at 549, which held that the use of a weapon during a drug deal is both foreseeable and within the "scope of the unlawful project." Without the benefit of any presumption, the government presented enough evidence for a reasonable jury to determine that a defendant's use of his weapon was both foreseeable to his co-conspirators and within the scope of the conspiracy. The government again presented evidence which involved the players within the conspiracy, and not simply drug dealers in general. The evidence supplied by the government showed that the transaction revolved around the presence of the gun, and the actions of the players created a situation where the co-defendants knew or should have known of the existence of a firearm.

There appears to be a split of authority among the

Circuit Courts of Appeal regarding the standard of proving the element of foreseeability. There also appears to be a trend among the Circuits to recognize a nexus betweens guns and drug dealing based on cases which they have reviewed in the past, without consideration of the facts of the case pending review. This erosion of Due Process should be halted by the consideration and review of the United States Supreme Court. The Court should establish minimum standards of proof required to satisfy the Foreseeability element of a Pinkerton conviction.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue for review of the March 15, 1995 Order and Judgement of the United States Court of Appeals for the Eighth Circuit in United States v. Fred A. Friend, No. 94-2263, 50 F.3d 548 (8th Cir. 1995).

Respectfully Submitted

FRED A. FRIEND, Defendant
By William C. Bracker
501 South Main
Council Bluffs, Iowa 51503
Telephone (712) 322-0092
Counsel for Petitioner

CAUSE NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

_____ 1995 TERM

FRED A. FRIEND,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

SEPARATE APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WILLIAM C. BRACKER
501 S Main St.
Suite. 203, Kiel Building
Council Bluffs, Iowa 51503
Telephone No. (712) 322-4215

SEPARATE APPENDIX

Table of Contents

Opinion delivered upon the rendering of judgment by the court whoses decision sought to be reviewed:

United States v. Friend, No 94-2263NEO . . . . . A - 3

United States v. Friend, No 94-2263, 50 F.3d 548 (8th Cir. 1995) . . . . . A - 4

Partial Transcript of Trial, pp. 441-495 . . . . . A - 18

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-2263NEO	*	
	*	
United States of America,	*	
	*	Order Denying
	*	Petition for
Appellee,	*	Rehearing and
	*	Suggestion
	*	for Rehearing En
	*	Banc
vs.	*	
	*	
Fred A. Friend,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 25, 1995

SO ORDERED:
FOR THE COURT.
MICHAEL E. GANS, Clerk
By: /s/

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-2263

United States of America,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeal from the
	*	United States
v.	*	District Court for
	*	the District of
	*	Nebraska
Fred A. Friend,	*	
	*	
Defendant - Appellant.	*	

Submitted: November 15, 1994

Filed: March 15, 1995

Before MAGILL, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

LOKEN, Circuit Judge.

Fred A. Friend appeals his conviction on eight counts of drug trafficking in violation of 21 U.S.C. §§ 841 (a) (1) and 846, and one count of using a firearm equipped with a silencer during and in relation to a drug trafficking conspiracy in violation of 18 U.S.C. §924 (c). We conclude that the district court properly denied Friend's motion to suppress evidence seized during a search of his automobile. However, we agree with Friend that there was insufficient evidence that another conspirator's secret use of a firearm equipped with a silencer was, for Friend, a reasonably foreseeable consequence of the conspiracy. Accordingly, we reverse the firearm conviction and remand.

I. The Suppression Issue

On October 17, 1990, police executed federal search warrants at numerous locations in and around Omaha, Nebraska, the result of a lengthy investigation of methamphetamine trafficking by Gary Apker and other members of the local Hell's Angels Motorcycle Club. This investigation is more fully described in United States v. Lucht, 18 F.3d 541 (8th Cir.) cert. denied, 115 S. Ct. 363 (1994), which affirmed the convictions of Apker and other conspirators.

The searches included the Hell's Angels clubhouse at 1906 Military Avenue in Omaha. Friend, a club member who lived next door, was in the clubhouse during this search, and police found 3.5 grams of methamphetamine on Friend's person. As the search continued, Officer Tim Shannon had his drug detection dog sniff the clubhouse, the garage at the rear of the clubhouse property, and several cars parked in the alley

behind the clubhouse.

One of these cars belonged to Friend. It was parked next door to the clubhouse, between the alley and the garage for Friend's residence at 1916 Military Avenue. This property had a security fence surrounding its back yard. Locked gates barred entry to the fenced-in yard, where another vehicle was parked. However, Friend's car was parked outside the fenced area, between the garage and the public alley, backed up to the end of the fence.

Officer Shannon led his dog around Friend's car. On the driver's side, between the car and the garage, the dog alerted to the seam of the car door, indicating the presence of drugs in the rear seat or the trunk. Police then impounded the car. They obtained a search warrant based upon the dog's alert and discovered approximately one pound of methamphetamine in the truck, packaged in the same manner as drugs found at Apker's house.

Friend was initially charged with violating Nebraska drug laws, but the state trial court suppressed the evidence found in the trunk of Friend's car. The Nebraska Supreme Court affirmed, concluding that the search was not authorized by the warrant to search the clubhouse; that Friend had a reasonable expectation of privacy in his parked, locked vehicle; and that the dog sniff was thus an unreasonable search prohibited by the Fourth Amendment. State v. Friend, No. 91-362 (Neb. Jul. 25, 1991). The state charges were then dismissed, and federal authorities commenced this prosecution.

Following an evidentiary hearing, the district court denied Friend's motion to suppress the evidence seized from the trunk of his car. Disagreeing with the Nebraska

Supreme Court, the district court concluded that Friend had no reasonable expectation of privacy in the area where his car was parked, and therefore the dog sniff was not a Fourth Amendment search:

> The area {where the car was parked} is outside the garage and adjoins a public alley in such a manner as it is impossible to ascertain where the property line ends and the public area begins. The small concrete slab outside the garage is the only portion of the area in question that might conceivably be considered private, yet the slab was not even large enough to allow for parking a vehicle entirely on the slab. The alley area provides parking for the residents of 1906 and 1916 Military Avenue as well as all other neighboring residences and an apartment building. The garbage cans of other residences are in the area, indicating the availability of the area to garbage collectors. Also, the area is available to delivery vehicles approaching the apartment building as well as neighboring residences. The area is completely open to public access and public view, and no signs or barriers are posted to the contrary. In fact, the fence gate leading from the yard of 1906 Military Avenue into the alley area demands that whoever leaves from that gate enter into the alley and walk by the area behind 1916 Military Avenue where the vehicle in question was parked.

On appeal, Friend argues that the search of the clubhouse and his person were illegal; that the police had no other basis for entering his property and searching his locked car, by dog sniff or otherwise; and therefore that the warrantless search violated his Fourth Amendment rights.

A.

At the outset, we note an aspect of this issue not discussed by the parties or the district court. The October 17, 1990, searches were the product of joint federal-state law enforcement. Friend was then prosecuted in state court. Only when suppression of key evidence was affirmed by the Nebraska Supreme Court did federal authorities commence this prosecution, seeking to rely upon the very same evidence.

The district court undertook its own de novo determination of Friend's suppression motion, essentially ignoring the Nebraska Supreme Court's prior decision. It appears settled that this was correct, because the Fourth Amendment issue "is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." Elkins v. United States, 364 U.S. 206, 224 (1960); see also United States v. Singer, 687 F.2d 1135, 1144 n.16 (8th Cir. 1982); United States v. Wedelstedt, 589 F.2d 339, 347 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979). While we have misgivings about the result that rule produces in this case, where federal and state authorities jointly obtained the evidence, and the State took the suppression issue to its highest court, we are bound by Supreme Court and Eighth Circuit precedent that the state court's Fourth Amendment determination is not binding on the United States in a subsequent federal prosecution.

Turning to the merits of the Fourth Amendment issue, we agree with the district court that the dog sniff of Friend's car was not a Fourth Amendment search. In United States v. Place, 462 U.S. 696, 707 (1983), the Supreme Court commented:

{T}he canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here -- exposure of respondent's luggage, which was located in a public place, to a trained canine -- did not constitute a "search" within the meaning of the Fourth Amendment.

Though it was technically dictum in Place, we quoted this passage in United States v. Harvey, 961 F.2d 1361, 1363 (8th Cir.), cert. denied, 113 S. Ct. 238 (1992), and concluded that a dog sniff of luggage on a public bus is not a Fourth Amendment search.

Place and Harvey control the question presented in this case. Like a piece of luggage in a public place, "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." South Dakota v. Opperman, 428 U.S. 364, 367 (1976). To be sure, the Fourth Amendment protects against unreasonable searches of automobiles -- for example, absent probable cause police may not break into and search a car that is parked and locked on a public street or alley. But a dog sniff of a car parked on a public street or alley, like a dog sniff of unopened personal luggage on a public bus, is so limited an intrusion on protected privacy interests as to not amount to a search for Fourth Amendment purposes.

In this case, Friend's car was parked, not on the street, but on his property, outside a locked gate and fence, between the garage and a public alley. Friend argues that his Fourth Amendment rights were violated

when Officer Shannon led the dog onto this property to conduct a drug detection sniff. We disagree. Fourth Amendment protection is strongest for a person's home and the area around a home, known as the curtilage. By contrast, the Fourth Amendment does not protect an open field, see Oliver v. United States, 466 U.S. 170, 178 (1984), and it does not protect illegal activity or contraband in a barn that can be observed from an open field. See United States v. Dunn, 480 U.S. 294, 303-05 (1987).

We agree with the district court that all of the curtilage factors identified in Dunn, 480 U.S. at 301,[1] support that court's finding the Friend's car was not parked within the curtilage of his residence. This finding is not clearly erroneous. See United States v. Swepston, 987 F.2d 1510, 1513 (10th Cir. 1993) ("{W}hat comprises curtilage is a question of fact."). Given the car's location, the situation was no different for Fourth Amendment purposes than if it had been parked on the street. At that location, Friend's legitimate expectation of privacy regarding his parked car did not extend to the uniquely limited intrusiveness of a dog sniff. Cf. United States v. Ventling, 678 F.2d 63, 65-66 (8th Cir. 1982) (no reasonable expectation of privacy in tire tracks in a driveway, despite "No Trespassing" signs). Thus, the district court correctly held that the dog sniff outside the door of Friend's car was not a search.

---

[1] "{T}he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."

C.

When the dog alerted for drugs in Friend's car, the police had probable cause to impound the vehicle and to obtain a warrant to search it. See United States v. Graham, 982 F.2d 273, 274 (8th Cir. 1992). Friend argues that the warrant was defective because the warrant application did not disclose that the car was parked on private property. However, that did not affect whether the dog's alert provided probable cause to issue the warrant.

Moreover, "{o}nce probable cause is established, a car can be searched without a warrant under the automobile exception to the warrant requirement." United States v. Bloomfield, 40 F.3d 910, 919 (8th Cir. 1994) (en banc); see also United States v. Martel-Martines, 988 F.2d 855, 858-59 (8th Cir. 1993). In this case, after impounding Friend's car, the police commendable followed "better practice" and obtained a warrant before searching the locked car, as we suggested in United States v. Perry, 925 F.2d 1077, 1081 (8th Cir.), cert. denied, 502 U.S. 849 (1991). The resulting search was valid, and the district court properly denied Friend's motion to suppress.

III. The Firearm Violation

On the day police arrested Friend and impounded his car, they also searched the home of the suspected ringleader, Gary Apker. They found some ten pounds of methamphetamine, $225,000 in cash, and a firearm equipped with a silencer. The firearm and homemade silencer were found in a large compartment beneath the cement floor under a bathroom vanity in the basement level garage, wrapped in a cloth bag and surrounded by

most of the money and drugs. Count IX of the indictment charged Friend with violating 18 U.S.C. § 924 (c) (1) by using this firearm during and in relation to the methamphetamine distribution conspiracy. The jury found him guilty of this charge, which increased his prison sentence by thirty years.[2] We reverse this conviction.

A conspirator is criminal liable for a substantive offense committed by another conspirator within the scope and in furtherance of the conspiracy unless that offense "was merely a part of the ramifications of the plan which could not be reasonable foreseen as a necessary or natural consequence of the unlawful agreement." Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). Firearms are frequently employed to further drug trafficking conspiracies, and we have applied this "Pinkerton doctrine" in affirming § 924 (c) convictions of conspirators who, like Friend, did not actually use or carry the weapon. See United States v. Lucas, 932 F.2d 1210, 1219-20 (8th Cir.), cert. denied, 502 U.S. 929 (1991), 502 U.S. 1100 (1992); United States v. Golter, 880 F.2d 91, 93 (8th Cir. 1989).

The government must meet two distinct burdens in proving Friend guilty of such a Pinkerton charge. First, it must prove that another conspirator, here presumable Apker, violated § 924 (c) by using or carrying a firearm

---

[2]18 U.S.C. § 924 (c) (1) mandates a consecutive sixty-month prison sentence if a firearm is used or carried during or in relation to a drug trafficking crime. This mandatory sentence is increased to 360 months "if the firearm . . . is equipped with a firearm silencer or firearm muffler."

equipped with a silencer during and in relation to their drug trafficking conspiracy. Viewing the trial evidence in the light most favorable to the government, as we must, the government clearly met that burden. We have repeatedly recognized "that drug traffickers typically keep firearms available to protect themselves and their drugs and drug money." United States v. Jones, 990 F.2d 1047, 1049 (8th Cir. 1993), cert. denied, 114 S. Ct. 699 (1994). In this case, the jury could find that Apker used a silencer-equipped firearm to further the conspiracy when he secreted that weapon in the midst of his stash of methamphetamine and cash. Compare United States v. Duke, 940 F.2d 1113, 1119 (8th Cir. 1991); United States v. Lyman, 892 F.2d 751, 752-53 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990).

Second, the government must prove that Apker's possession of a silencer-equipped firearm could have been reasonable foreseen by Friend, as a natural or necessary consequence of their conspiracy.[3] The government argues broadly that drug trafficking is a violent business and therefore it is reasonable foreseeable to all members of a methamphetamine distribution conspiracy that guns would be used to protect the conspirators, the drugs, and drug proceeds. But "there is no presumption of foreseeability." United

---

[3]We reject Friend's contention that the district court erred in refusing to substitute "was reasonable foreseen" for "could have been reasonable foreseen" in its instruction defining the elements of the Count IX offense. We approved the term used by the district court as "fully comply{ing} with Pinkerton's requirements" in Lucas, 932 F.2d at 1220.

States v. Castaneda, 9 F.3d 761, 767 (9th Cir. 1993), cert. denied, 114 S. Ct. 1564 (1994). The government must prove criminal conduct beyond a reasonable doubt. In this context, that means proof that Friend's knowledge of and role in the conspiracy was such that he could reasonably have foreseen Apker's use of the firearm. Our prior cases dealing with this issue have all required this type of defendant-specific proof. See United States v. Martinez, 958 F.2d 217, 219 (8th Cir. 1992); Golter, 880 F.2d at 94.[4] Thus, we must turn to the government's proof at trial on this issue.

The core of the government's physical evidence at trial was the one pound of methamphetamine found in the trunk of Friend's car. This contraband was cut and wrapped like methamphetamine found in Apker's home. It was found resting in a helmet with a "Cleveland" decal or logo that other evidence linked to Apker. By itself, this evidence only proved that Friend had acquired a substantial quantity of methamphetamine from Apker, strong evidence that Friend was at least a peripheral member of Apker's distribution conspiracy, but perhaps not enough to prove that customer Friend could reasonably foresee that supplier Apker had a firearm

---

[4]Other circuits appear to have adopted a similar standard. In addition to the Ninth Circuit's decision in Castaneda, 9 F.3d at 766-67, see United States v. Christian, 942 F.2d 363, 367-68 (6th Cir. 1991), cert. denied, 502 U.S. 1045 (1992); United States v. Cummings, 937 F.2d 941, 945 (4th Cir.), cert. denied, 502 U.S. 948 (1991); United States v. Diaz, 864 F.2d 544, 549 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989).

hidden with his stash of drugs and drug proceeds.

But the government's evidence did not end there. It also included a tape of a lengthy conversation between Apker and Friend at Apker's house, a conversation which ended at 3:55 a.m. on October 17, 1990, just hours before the search of that house. Viewed most favorably to the government, the tape revealed a wide-ranging discussion by Friend and Apker of their long-standing methamphetamine manufacture and distribution activities. They talked about many people who had engaged in these activities with them, and the difficulties each was having collecting for the illegal drugs he had sold. This conversation clearly put Friend well inside the periphery of the conspiracy, in a position to know the violent nature of the business and therefore the likelihood that a major supplier like Apker would have a stash of drugs and proceeds protected by a firearm.

However, while this analysis justifies convicting conspirator Friend for Apker's use of a firearm, it does not answer the separate question of the silencer. The government argues that, if use of a firearm is reasonably foreseeable, the conspirator is liable for whatever weapon was in fact used. On the facts of this case, we disagree. After instructing the jury on Count IX, the district court also charged on the lesser included offense of using a firearm with no silencer. The government did not object, thereby acknowledging that a separate element of Count IX is that a firearm equipped with a silencer was used during and in relation to the drug conspiracy. Therefore, under Pinkerton, the government must prove beyond a reasonable doubt that Friend reasonably could have foreseen Apker's use of that silencer-equipped firearm.

There was no proof whatsoever on this issue. Apker had bragged in an intercepted conversation with another conspirator that, "No one in the United States knows about this safe," where the firearm was hidden. The police officers who discovered the well-hidden firearm testified that they were surprised to find it equipped with a silencer. There was simply no evidence that Friend had actual knowledge of any firearm in Apker's house, much less a firearm equipped with a silencer.

Nor did the government present any evidence describing how a silencer-equipped firearm might generally be used to further a drug distribution conspiracy. The police officer who testified that "{o}ver 80 percent of the investigations involving narcotics reveal some type of weapons" gave no testimony concerning the prevalence or use of silencers. And the prosecutor in closing argument admitted that "{a} gun with a silencer, however, is unusual." We conclude that there was a total absence of proof that Apker's silencer could have been reasonably foreseen by Friend. Therefore, Friend's conviction on Count IX and the twenty-five year sentence enhancement he received for this unproved crime must be reversed.

III.

The judgment of the district court convicting Fred A. Friend of Count IX of the indictment is reversed. However, the evidence was sufficient to convict Friend of the lesser included offense of using a firearm without a silencer during and in relation to a drug trafficking conspiracy. The jury in convicting Friend of the greater offense necessarily found that he committed this lesser included offense. Accordingly, we remand with

directions that the district court enter an amended judgment convicting Friend of this lesser included § 924 (c) offense and modifying his sentence as may be appropriate. See United States v. Cavanaugh, 948 F.2d 405, 409 (8th Cir. 1991). In all other respects, the judgment of the district court is affirmed.

/s/
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

(Exhibit 9A, Conversation 68, was played as follows:)

Apker: That's where I'm getting' so far behind. Ah, just tryin' to do shit --

Friend: Yeah.

Apker: -- and ya try to do anything and you gotta answer at least fifty questions at one time, do seven other things at the same fuckin' time and take care of everything.

Friend: Yeah.

Friend: Gary, they're always askin' for that. They haven't quit. They'll be at ya until you give 'em the right answer.

Apker: I (unintelligible)

Apker: I got the answers.

Friend: So let's do it right.

Apker: Huh?

Friend: When you're busy like that and somebody asks you a question, it's a stupid question (unintelligible) I gotta ask you a stupid question uh, okay, well, I'm gonna give you a stupid answer.

Apker: You know, goddamn, I hate to be fuckin' busy they had, you know and ah --

Friend: Yeah.

Apker: And ah, sometimes you are and so I mean if ah you weren't you'd ah, probably --

Friend: (unintelligible)

Apker: -- have a lot more time ta sit and hammer on someone else that's not doing anything.

Friend: Yeah.

Apker: You know, a person's not doin' anything can really fuckin' hammer the questions out.

Friend: Yeah, that's usually -- usually a lot of times questions or ain't never gonna admit they need the knowledge anyhow. You know what I mean?

Apker: Yup.

Friend: He was just askin' questions to ask question and every -- and if the person answered the question, then they say some day need that knowledge to accomplish something, you know what I'm talking about. (Excerpt omitted)

Apker: and ah, Lamont hit me up is (and) ah, Tiny, Chitlin' and them down there are blown (blowin') their fuckin' wad up a fuckin' lawyers --

Friend: Yeah.

Apker: -- and ah, Tommy come up and says they need some help really fuckin' bad if you can get some. So when I went out there ah, Norm paid me off. Norm paid for any of their shit so I go a double fuckin' hump an hustle see if I can get anything goin'.

Friend: Yeah.

Apker: So I got her shot, you know, he said anything they can get, two or three pounds, so I had a shot of gettin' five

more pounds. If I shot, and if I got home (some), 'cause I didn't have shit for money -- if I could get home (some) and shoot him back the fuckin' money, he can (could) put it down on it to hold it until, you know, I get somethin' workin'.

Friend: Uhm.

Apker: And ah, find out that as it went down and Roger didn't get the -- you know, when he got home he was gonna take the plane (the) next day right back, you know. Well, then he didn't and then he was gonna take it the next day. So they're probably -- You know, when you're all goin' over there, I can -- might go down and get a plane ticket for the next day --

Friend: Yeah.

Apker: -- so he made it for two more days.

Friend: Oh.

Apker: So, fuck, here I am, he's sittin' out there expectin' the money out there at eleven o'clock that night. Already two days late.

Friend: Fuck.

Apker: You know, so I gotta run and find a phone booth to call and you're callin' back and forth and gettin' different ones and all that and you gotta get some fuckin' money out 'er the deals off.

Friend: Yeah.

Apker: So then I have ta end up goin' to a motherfuckin' truck stop --

Friend: To wire it, yeah.

Apker: -- and wirin' fuckin' five grand from this one, five grand from that one, five grand from, you know --

Friend: Uhm.

Apker: -- so here I am runnin' my motherfuckin' ass off till about three-thirty in the fuckin' morning, it cost me ah, oh, probably about twelve hundred fuckin' dollars, out of my own fuckin' pocket, but I wasn't sittin' over there partyin' and havin' fun.

Friend: Yeah.

Friend: (unintelligible)

Apker: That's when ya say, hey, I'm sorry, I didn't come up with anything.

Friend: (unintelligible) referred it back to their own people.

Apker: I just can't help them guys is all.

Friend: It's easy to assume, right? You can assume a lot of things, but you don't know, and this is the way you are the way I have everything else is like you just don't feel you're doin' anything wrong and you just carry on your business as ah, -- while other people are sittin' there assuming other things and on top of that, then again somethin' else, and then again somethin' else and pretty soon, you know, it looks like you could be the bad guy (UI) you know what I mean? And, but you --

Apker: Yup.

Friend: -- not by -- just by being yourself.

Apker: No fucking doubt.

Friend: Not doin' nothin' wrong, but just (you) leavin' yourself open.

Apker: Leave myself open 'cause I was, you know.

Friend: I know cause I've had the same fucking condition, Gary. (unintelligible)

Apker: (unintelligible) this and that, you know.

Friend: You know, hey, like when ah, Stanley said number two (UI) now when they started accusin' you with stuff and they come off with days they said for, would you appear at this certain day, and stuff like (unintelligible), but they said I was doin' (what) I wasn't doin', but, you know, I look at this, yeah, I was there and -- I was there on that day, but that wasn't what I was doin', but, you know (unintelligible)

Apker: (unintelligible)

Friend: But it may very well -- maybe looked like I was.

Apker: But what if -- what if you gave your word to have some money out there a certain time --

Friend: Yeah, I can dig it.

Apker: -- and then ya -- then ya -- ya gotta call and gotta drop a hint, it's gonna be (unintelligible) a day or so late, ain't no problem, and ah, you go and you give 'em the money for the ticket and everything else, you think everything's fine and you go over there, oh, man, I got it for two more days, and they're sittin' out there

plannin' on it -- that night they've been, you know, ah, shovelin' (shuffling) shit around so they can, you know -- well, fuck, if -- if I can't say I have the money out there at a certain time, if it don't get out there at a certain (time), you know about what the fuck it's gonna be worth next time.

Friend: I understand what you're saying. I understand exactly what you mean (UI), but I have to. I try to figure what you --

Apker: Hey, I got it.

Friend: not (no) I'm not sayin' you took anything wrong or nothing.

Apker: Oh, I know.

Friend: (unintelligible) it's just, but --

Apker: I know, so it's --

Friend: -- it's just -- just like bein' your natural self and just the same thing as I do it (unintelligible) --

Apker: So I can't -- I can't --

Friend: (unintelligible) and if somebody wants to make it look bad for ya, they can make it look bad.

Apker: I can't -- I can't go out and get all that shit hustled for everybody and not spend any time.

Friend: Oh, yeah.

Apker: And then in order to do it, you end up no good, working your ass off, and so the best way to do is just kick it on back --

Friend: Right.

Apker: -- just kick it on back. If all I had to

do was just get on a motorcycle and ride back and forth ta the clubhouse or hang out in the bar, fantastic.

Friend: Yeah, I'm for ya.

Apker: So, I'm not, you know, I'm not plannin' on goin' out there for another two or three months. I can have myself a lot more time kickin' back. There's a lot of difference of drivin' out there and back and doin' everything and gettin' back and goin' out and partyin' that night.

Friend: Yeah.

Apker: Then sittin' on a couch for three days. Hey, if I can -- if I don't have to go out --

Friend: You know -- you know, I felt bad.

Apker: -- if I don't have to go back and forth -- if I don't have to go back and forth, goddamn, I got so much time I can sit over there and do nothin'.

(Excerpt omitted)

Apker: Yeap. I had some of that mag cleaner. I thought I had it (sitting) right over there on the washer.

Friend: Oh. I got me a card from Pace now.

Apker: Do you?

Friend: Is that that helmet you want me to take back?

Apker: Yeah.

Friend: Cleveland on it. Who's that go to?

Apker: Freddy.

Friend: Freddy. Yeah, okay.

Apker: It seems like -- it seems I was -- I got them mags from ah, Dale down there --

Friend: Yeah.

Apker: -- in Kentucky.

Friend: Yeah.

Apker: And they were going to trial, he got some --

Friend: Yeah.

Apker: -- and oh, this is the way I'm gettin' my money back now, some of it. This, you know, before this is quite a ways back.

Friend: Mag cleaner, mag cleaner.

Apker: She's been gettin' a black bottle. Oh, I got some somewhere ah, but this is still from when those guys started the trial down there in Louisville.

Friend: Yeah.

Apker: I still haven't got my money back from the first one he got then.

Friend: Oh, I'm -- I'm --

Apker: You know.

Friend: -- and it's usually (unintelligible) out here in the (unintelligible) taken care of things (unintelligible) I gotta do shit (unintelligible)

Apker: See, I (unintelligible)

Friend: It's all fun and games and shit (unintelligible) you know, it's great after so many days, you know. I -- I'm startin' ta get on, you know (unintelligible) you know, I said if you don't take care of (unintelligible) I can't take care of this (unintelligible), but I don't want to do it, but I don't give a shit (unintelligible)

Apker: It really, really makes it fuckin' hard on them.

Friend: And ah --

Apker: You know.

Friend: -- and I say, you know, it -- it -- I talked to him, I've talked to (unintelligible) I said, you know (unintelligible) got the money I (unintelligible) okay (unintelligible) I mean I -- I (unintelligible) and I know, too.

Apker: Hey, Frizzy's still got some from when he was on a run back here.

Friend: I thought that was taken care of.

Apker: Willie's still got (some) no.

Friend: He got somebody else to --

Apker: Well, and there --

Friend: -- to take care of it for him.

Apker: Yeah, ah (unintelligible) but ah (unintelligible)

Friend: (unintelligible)

Apker: They're still -- They're still in the fuckin' hole.

Friend: I wish Frizzy would have told me instead of going over to Kevin's (unintelligible)

Apker: You know he --

Friend: (unintelligible) I -- I could of took it up with me and we'd (unintelligible)

Apker: No, he -- he --

Friend: (unintelligible) 'cause he -- 'cause he ah (unintelligible)

Friend: you know doin' (unintelligible)

Friend: and then when it come down to it he had got his so he had ah (unintelligible) more ta cover up on the other end (unintelligible) you know, and I see where (unintelligible),

but Kevin's never (unintelligible) garbage.

Apker: Here I'm in with two of them still in the hole, you know.

Friend: Uhm-hmm.

Apker: Dale's still in the hole, Willy's still in the hole.

Apker: You know.

Friend: Yeah.

Apker: And I'm s'pose make a go? That's where my other police special went.

Friend: I know how ya (unintelligible)

Friend: I gotta --

Apker: That's where that -- that --

Friend: No, I mean --

Apker: -- that's where -- that's where that one's gonna go as soon as I clean it up, it's gonna go. Get a ten grand loan on that one.

Friend: (unintelligible)

Friend: (unintelligible) get ahead here some.

Apker: But it just, you know, ah --

Friend: I've been figurin' out, you know, about how much people owe me and stuff and I said (it would help) if they would pay up that up (that owes me) you know, like right now, I'd retire from it (unintelligible) (and there wouldn't be no problem), you know, if people would just pay all up that owes me, you know. I'm sick of fuck this, I'm tired of livin' like this that I'm, you know, I wanna ta -- I wanna get ahead of this thing (unintelligible)

Apker: Hey.

Friend: (unintelligible)

Apker: And I'm workin' my fuckin' ass of drivin' back and forth and everything else and havin' ta give up (my) fuckin' motorcycles.

Friend: Yeah.

Apker: (I'm having to give up) motorcycles -- up my motherfuckin' motorcycles --

Friend: Yeah.

Apker: -- 'cause people are in debt.

Friend: Yeah. If I can (unintelligible)

Apker: You know.

Friend: (unintelligible) I mean I try ta (unintelligible) you know ah, (unintelligible) hey, give me a break (you know) so I can turn around and give you a break, you know, but us be on the other end (unintelligible) you know what I mean, Gary? (unintelligible) and it's like I said I'll -- all I'm tryin' to tell Mike till I can get it to you, I am worried to death about it (unintelligible) that ah, somethin' is fucked up and (unintelligible)

Apker: Corky's got ah --

Friend: They fucked me, and I just --

Apker: I think Corky's gotta --

Friend: -- they fuck me, you know, and I just --

Apker: Corky's got a way that he does it now, he takes it out and fronts out to some guy, gets all of his money out of it first and then when the last little bit comes dribblin' in, then he'll pay me and usually he'll want more before he ever gets paid --

Friend: I don't --

Apker: -- and ah, you know, and I mean after you do a couple three you oughta have the money to pay in front and ah, like I tell 'im, hey, if I'm goin' out there, get (all) the motherfuckin' money you can so I can pay everything up, but he says, well, I'm tryin' to get the money from the guy, but I haven't got it. Well, fuck gettin' it from the guy, take some out of your own pocket.

Friend: Yeah.

Apker: You know, it ain't my deal.

Friend: If I had -- If I had it in my pocket, you'd bet I (I'd) be givin' it to ya.

Apker: But Corky can't see it that way.

Friend: My problem, ah -- ah, my situation is it's so hard startin' all over again.

Apker: Corky does --

Friend: (unintelligible)

Apker: Corky does probably as much as everyone in the charter put together. You know.

Apker: You know, he should be ah, fuck just eatin' up the fuckin' money.

Friend: And you can see what I got, Gary.

Apker: And yet -- And yet, he don't even have money enough to pay for it.

Friend: Gary, you can see what I got anytime, day or night, brother, so you know I don't hide nothin'.

Apker: But I mean, fuck (UI) you just --

Friend: You know.

Apker: This, you know --

Friend: You can see -- You can see every di- - - where every dime I got goes. Uhm.

Apker: Fuck, as soon as I get the fuckin' money, and you know how hard it is to send the fuckin' money out there?

Friend: Yeah, I know it's very hard to send money to there guys (unintelligible)

Apker: You gotta find somehow you're gonna send out ah, some kind of tool or ah --

Friend: But, you know, anything (unintelligibe)

Apker: -- you know--

Friend: (unintelligible)

Apker: -- you gotta drop a tool or a box or a planter (planer), a toolbox, a drill press or somethin' like that to put it in there.

Friend: Uh-huh.

Apker: Well, you run out of fuckin' things to -- to think of. You know, you -- you gotta run out and get one --

Friend: (unintelligible) anytime you need any help with anything, you know, ah -- but anytime just call me (and say, hey) (unintelligible)

Apker: It's just -- It's just so motherfuckin' hard ta try to get it out there like you're s'pose to, you know, and ah, when -- when they get ya so fuckin' behind in three or four places ah, you're -- you're just now (not) -- you can't cover whatcha bought and area gonna get (can't cover whatcha already did) so you gotta go and just do what you can and then hurry up and as soon as I get back I'll get it, shoot it (shipped) right back to ya,

and then you're just bustin' your fuckin' ass --

Friend: Ahh.

Apker: -- and so, you know, I kept thinkin', hey, you know, as bad as them other guys need the fuckin' help, you help'em out and, boy, they'll really go and everything will be goin' good. Well, fuck, the harder you work ta help, it seems like the backwardser they go, you know.

Friend: Yeah (unintelligible)

Apker: You know, it's just -- it's just one of them fuckin' things, it just --

Friend: (unintelligible) I was --

Apker: It's so motherfuckin' hard (unintelligible)

Friend: (unintelligible) I saw Murph get his new bike and -- and he wanted to borrow money. I says, Murph, I -- I ain't loanin' you money to buy a new bike. Well, I don't have that money. I said, if you had that money to pay me so I would pay mine off, then before -- you know what I mean?

Apker: Oh, yeah.

Friend: You know, I says (unintelligible) this is tearin' me up you goin' out here to buy a new bike. I says, you know, I says (unintelligible) to me I don't think, you know, I got in a couple arguments (unintelligible)

Apker: (unintelligible)

Friend: Murph, (I said) this is -- this is really makin' me feel bad (unintelligible) that you owed me this money so it -- it

ain't money that's mine (unintelligible) it's money if you give to me, I can pay off mine. I can (UI)

Apker: How'd you think it feels when ah --

Friend: And it's not -- and it's, you know -- it's not like I'm makin' a fortune off of it, you know.

Apker: Hey but --

Friend: You know, it's not like I'm gonna make a fuckin' fortune off of him, you know what I mean?

Apker: How do you -- how -- how would you like it if them gets a new bike and you're havin' to give yours up ta cover for Bill.

Friend: I'll tell you what, Gary --

Apker: So you wanna get --

Friend: I'm sittin' there, Murph bought a new bike and I'm sittin there think' about hey, before I would get (unintelligible) (you know) I was thinkin' about sellin' my bike to pay you. I think I was. I was thinkin' about sellin' -- sellin' my bike and I was bustin' my ass off to get (it), but I thought I owed myself, you know. It wasn't like ah --

Apker: Well, we shouldn't have --

Friend: (unintelligible) every day, you know, but it (unintelligible) and I was considering before, you (know), I'd of paid mine.

Apker: We shouldn't have to do that, though.

Friend: I was very much considerin' on sellin' mine. I'll tell ya, me and Murph ah, so I go -- I went up to Minnesota then

when he got involved in (unintelligible) that night I go tellin' me you left.

Apker: Uh-huh.

Friend: How -- How in the hell was (unintelligible) I mean, it was really (unintelligible) and it didn't bother me, you know, 'cause ah, I'm not that ah (unintelligible) not that way I says I don't like to owe (unintelligible)

Apker: It's ah -- It's a son of a bitch with you.

Friend: Yeah, I know (unintelligible) if I owe that, it's just drivin' me crazy till I got it paid.

Apker: Uh-huh. Let's see, I got five hundred dollars in them tires there.

Friend: Jimmy fucked me one time. He fucked me bad and ah, well I found out later that it was him, but he fucked me and ah, I sold -- I had to sell every fuckin' thing, sell everything I owned to pay off a debt, right, and then later on I found out it was him. He's tellin' me that it was because of this broad and I believed him and I found out later it was him that did it to me. It just like I was tellin' Lamont and you (was) standin' there at the door about, you know, with Kaplan, I told him, hey, ah, I don't care if you use Kaplan, I -- because all that shit Jimmy was puttin' out about Kaplan ah, you know, was not ah, that was the little story he wanted to make everybody

believe.

Apker: Hey, if I was just on my own --

Friend: Jimmy -- Jimmy fucked over a lot of people. He was a greedy motherfucker, man.

Apker: Hey, if I was just on my own doin' this for myself -- ah, you know, for all inconveniences get stuff for myself, fuck, it would be such a piece of cake.

Friend: Yeah.

Apker: You know, but when you try to help other people out and they start gettin' behind the eight ball, then you can't hardly even get the stuff yourself.

Friend: Yeah.

Apker: And I just, you know --

Friend: Calvin says you're (unintelligible) what'd you drivin' to Ohio, but shit (unintelligible) a lot of times there, but (unintelligible)

Apker: (unintelligible) new car and shit (unintelligible)

Friend: (unintelligible) but I sat down the other day and I started figurin' up every (unintelligible) all this money that people owe me.

Apker: It's -- It's scary, don't it?

Friend: Hey, you know -- I mean, it's nothin' as long as I can cover it, I'm -- I'm contented, I guess, but, you know, I just know this money's gone for quite awhile and people owe me, I'd say and then, you know, I could have a new car, I could have this and all the other shit if -- if all these people paid

up (unintelligible) it's only if they paid up. (unintelligible) pressure on the money, but, you know, ah, I guess that puts pressure on myself (unintelligible)

Apker: That's real, and ah, that's the other thing.

Friend: Okay.

Apker: That's another hour (pound) and a half there. Here's ah (unintelligible)

Apker: I don't know how --

Friend: (unintelligible)

Apker: (unintelligible)

Friend: A pound of work (unintelligible) pound. I'll take (unintelligible)

Apker: Yeah, somethin's wrong.

Friend: I keep thinking about paying six and six, but that's only (a) half a pound, (right), and then they got to pay another five for that. I know (unintelligible) put it back in that (unintelligible)

Apker: But you don't want (it) no grinder (finer).

Friend: I got one (unintelligible)

Apker: Run this through it first so it's finer.

Friend: Yeah, (unintelligible)

Apker: Yeah.

Friend: Yeah, (unintelligible) would work.

Apker: But ah -- if ya -- if ya (unintelligible) blend it bitter (together) really good and you put it in the freezer --

Friend: Yeah, that's what I always do --

Apker: -- and ah --

Friend: -- come out better.

Apker: -- it just gains its strength back.

Friend: (unintelligible) I've always done it, you know. He told me that (unintelligible), yeah.

Apker: Most of 'em won't do it, though.

Friend: Huh?

Apker: Most people won't do it.

Friend: I do, I know I -- I ah -- you told me that a long time ago and -- and I (unintelligible) you know, like (unintelligible) when I go back and get it and I don't (unintelligible), you know, and -- and it (unintelligible), you know, and the second day it's the same stuff (unintelligible)

Apker: (They) won't put it in the freezer.

Friend: Well, you know, I know -- I know people that's had experience with from (putting it in the) freezer to (unintelligible), you know, so it's not really the first time and, you know, if you don't trust it, put a little bit in and then look at it and see what happens, you know.

Apker: Yeah, Frank just told me that, you know and you know.

Friend: I do every chance I get --

Apker: I didn't believe him and I tried it and it worked. I don't know how long, you know, I really don't know how long you're s'pose to leave it in or whatever or how --

Friend: I try to do it I tried it for twenty-four hours with me.

Apker: I leave it in if I got a chance. I leave it in for three or four hours. I take it out and (unintelligible) I put it back in

again --

Friend: Yeah.

Apker: -- and I do that ah, you know, I've done it in three times like in three times I've put it back in and on the third time and I don't know whether it makes it a lot better or what, but it ah, 'cause it('s) never hurt it, you know. I've never had anybody come back and say it wasn't good.

Friend: Me neither. I haven't had, you know --

Apker: But if you don't --

Friend: Well, I had one broad tell me one time that it -- she says this ah, (unintelligible) you carryin' this stuff more and more or what I says nah and (unintelligible) and that first time I (unintelligible) she -- you were doin' one a week, one gram a week, now you're doing' five or six a day. I says maybe it isn't it, maybe it's you, huh? (unintelligible) why don't you quit for a while, you've played yourself up.

Apker: But you take and ah -- you know, the mad scientists told me that's (UI) standard. You do it the right way and he said it doesn't hurt the potency and, you know, I've tried it and tried it and tried it and ah, you know, it seems to be do(ing) what it's s'pose to.

Friend: You know, uhm, ah (unintelligible) I -- I need -- I need a couple the other, you know, but ah, they got that (unintelligible) you know, and they are

about getting it, but ah (unintelligible). Yeah, I may save on the (unintelligible)

Apker: I'm trying to get -- I'm trying to get the -- the things that you need ah, I would of had 'em already, but they couldn't get to where they want to give (get).

Friend: (unintelligible) and a couple hundred acres (unintelligible) down in the Smokey Mountains, you know, on private property, it's a cave (unintelligible) (they've been making moonshine in the cave) forty fuckin' years and, you know, I mean you go (unintelligible) if you don't know your way to the motherfucker, you'll never find your way out.

Apker: The only thing is that stuff gives off a gas or smoke and I don't know whether it's the heat or what it is to it, but they're s'pose to ah, take it up, you know, about this with those spy planes.

Friend: Yeah.

Apker: That's why they was filtering it through all the swimming pools and all that shit, and all that shit.

Friend: Yeah.

Apker: You know.

Friend: (unintelligible) they said this place there is about ah, it's like inside the mountain, and they moved ginger bush in there.

Apker: But you (UI) killer 'er.

Friend: You know I don't know how you can

do whatever you want to.

Apker: You run it through the water, you know, they run it through swimming pools and everything else --

Friend: And the lakes they have are a pocket size (pocket inside the caves) (unintelligible). You can probably (unintelligible) this motherfuckin' cave you go in on the one side through Georgia, but you -- you can come out on the other side through Tennessee. Yeah (unintelligible) (they've been doin' moonshine down there for years) (unintelligible)

Friend: All family down there, all family (UI).

Apker: Yeah, your most expensive stuff is your glassware --

Friend: Yeah.

Apker: -- and what I've been told is depend (it depends) on your chemist that's doin' it, who's ever makin' it. One person can take the exact same chemicals and everything --

Friend: And make shit.

Apker: -- and one (can) come out with like seventy percent and the other one (can) come out ninety-eight percent, and it's followin' the rules real close and I guess real consistent heat really makes a helluva difference and --

Friend: And the right chemist.

Apker: And you can't let the heat vary on it, you know, more than a couple tenths of a degree.

Friend: (unintelligible) motherfucker (he's) makin' acid now, he's makin' acid.

(unintelligible)

Apker: Right.

Friend: (unintelligible) make one big -- big batch of this stuff. Really good stuff, right.

Friend: And it last(s) you a few years or whatever and take him out of it (unintelligible)

Apker: (unintelligible) the glass --

Friend: (unintelligible)

Apker: -- the glassware's s'pose to be really --

Friend: Yeah, they keep buyin' all that (unintelligible)

Apker: The real tough, tough stuff to go with, I mean, to get, you know, and they say one gallon should make five pounds.

Friend: Then I should get five gallons (unintelligible)

Apker: Yeah, they use it for fiberglass, they use it also for ah, termite control, but you see now that isn't pure.

Friend: Right.

Apker: They've got to steal (distill) that, you know, to get that and (unintelligible) they've gotta distill that down, they gotta go through a lot of processes ta draw the right -- the bad stuff off. And so they got, you know, a purer thing --

Friend: Right, right.

Apker: -- and when they don't do that real good or not as perfect as it could be (unintelligible), that's what -- it changes the stuff on the other end,

you know, to where it -- it's a different taste, different color and so on, you know, it's just -- but (unintelligible) can do it real good, you know. I, you know -- I'm just goin' by what professor weirdo's sayin' --

Friend: Yeah.

Apker: You know.

Friend: I'm just sayin' if they would mention me awhile back (unintelligible) comes together and (UI) for all of us, you know.

Apker: Yeah. I -- You know, I didn't want to get into that -- that part of it, mainly because ah, it's so fuckin' hazardous 'cause --

Friend: And they charge a lot more.

Apker: -- 'cause all -- all the cooks (unintelligible) and they never see 'em again, you know, they just take off and leave their bond so (unintelligible) are just --

(Tape Number 171 ends)

. . .

(Conversation 68, Tape 172 was played:)

Apker: You know.

Friend: It's all my family.

Apker: No that you know --

Friend: (unintelligible)

Apker: probably -- probably somebody --

Friend: Shit, Gary, nobody's gonna (unintelligible) of course (unintelligible) (noise in background)

Apker: (unintelligible) you mean?

Friend: (unintelligible)

Apker: (unintelligible) be as safe as you can

be with it --

Friend: Yeah.

Apker: -- the whole fuckin' thing, everything to your advantage. (unintelligible) (commotion in background)

Friend: Step slowing (unintelligible) (commotion in background)

Apker: Goddamn, I wonder wh t the fuck I did with that shit.

Friend: Hap's got me one of them (unintelligible)

Apker: Hap did?

Friend: Yeah, and put it on his ah -- here, Gary -- put it on his company.

Apker: Uhm-hmm.

Friend: Harshbarger Trucking.

Apker: Yeah.

Friend: I gotta stop up there and pick it up, but I -- I know ah (unintelligible) sell the car (and) find out what --

Apker: Yeah.

Friend: -- 'cause I kept waitin' ta -- waitin' ta go with you when -- now -- now that I got my own car, now I can go pick up the stuff.
(excerpt omitted)

Friend: Yeah. (noise in background)

Apker: 'Cause ah, that's about where it was at nothing. (noise in background)

Friend: Oh, yeah, I talked to Dale again.

Apker: Yeah.

Friend: I think I owe Dale some (unintelligible) and ah (unintelligible) told him I said (unintelligible) I need some extra (unintelligible) Dale just you keep (unintelligible) pay off (unintelligible)

and then ah, you know, he can keep payin' me you and you can take off of his. Okay. Okay. Now say (unintelligible) you just keep payin' (unintelligible)

Apker: 'Cause ah (unintelligible) I though (noise in background) ah --

Friend: (unintelligible)

Apker: I'll give it -- I'll give it a shot and try to keep track, but --

Friend: Well, oh, I know. (commotion in background)

Apker: You know, I -- I remember that (noise in background) (unintelligible)

Friend: Yeah, (unintelligible) and if I owe -- I owe you twelve hundred, but if I give you that five hundred now.

Apker: Yeah.

Friend: (unintelligible), but ah --

Apker: (unintelligible)

Friend: only if you'll go and get a (unintelligible) so I'll -- I'll give (unintelligible)

Apker: Yeah.

Friend: (unintelligible)

Apker: Yeah. (noise in background) He ah, you know, he ended up in a position where, you know, where he as plannin' on some weed deal or somethin' --

Friend: Yeah, right.

Apker: -- and ah, it just never -- their -- their weed guy never -- never come through or somethin' and ah, you know (unintelligible)

Friend: (unintelligible)

Apker: Huh? Well, then he ended up ah, thinkin' he was gonna have that weed deal goin' --

Friend: (unintelligible)

Apker: -- he ended up -- he ended up on that weed deal thinkin' he was gonna have weed so (noise in background) he got -- I don't know what he did with the rest of the stuff, you know, the other kind of stuff (something).

Friend: Yeah.

Apker: Chucked it ah, was in ah, run out of ah, on a week or something? (run out of weed or something)

Friend: Yeah.

Apker: And ah --

Friend: He owed (The old) Peter to pay Paul thing.

Apker: Yeah and -- and -- and it ended up nothing.

Friend: (laughs)

Apker: You know, I mean it just --

Friend: Yeah, I know.

. . .

Friend: I can get my tires for fifty bucks a piece (pauses) just like them ones that's on that Cadillac.

Apker: Uh-huh.

Friend: I give 'em fifty dollars a piece, mounted and balanced.

Apker: Really? Motherfuck, that's good.

Friend: (unintelligible) (noise in background) fourteen inch to (is) fifty dollars apiece, fifteen inch is sixty-five dollars apiece. (noise in background) Thirteen inch ain't worth thirty

dollars, forty to forty-five dollars apiece, and the first (unintelligible) too.

Apker: Yeah. Shit that('s) damn good. (noise in background)

Friend: It cost me two hundred dollars, two hundred and ten dollars for (to put) four new tires on the Cadillac and the guy (unintelligible) (noise in background)

Apker: Yeah.

Friend: (And the Cadillac converter) it cost me like (about) two hundred and he wanted thirteen dollars (two hundred thirteen dollars). I had to pay for a vlue (valve) stem (noise in background), but ah, I got a guy (unintelligible) gets 'em for me so -- and you know there (they're) eight -- eighty-some thousand mile tires, and I've been runnin' -- I'm runnin' on -- I've gone through two sets on the Ranchero and I made him put another set on the Scout, you know, 'cause I like to keep good tires on highway like havin' a blow-out on it to change a tire, but --

Apker: I'm with ya there on good tires.

Friend: I've never had -- I've never had -- I've had one of them tires blow out on me in the last ten years.

Apker: Really?

Friend: I've only had one and that was on the Ranchero and that's when I (had a) load in the back in (of) the Ranchero and I think the tire was low to start

with a (and) I run it and I ran that thing, it got hot and I blew a sidewall out (noise in background) you know.

Apker: Uh-huh.

Friend: You know what happened there? I took it back to the guy and he gave -- he prorated and give me thirty-five dollars credit. I gave him fifteen dollars more and he gave me another brand new fuckin' tire.

Apker: No shit.

Friend: Yeah, and so I figured (laughs) and when I first -- I'm pretty sure it was my fault that fuckin' thing blew out.

Apker: (laughing)

Friend: You know what I mean?

Apker: Uh-huh.

Friend: I was -- I mean it and it was low on air and you know how they get hot, but it was low on are (air) and (it blew out) but the guy that (unintelligible) (he was nice to me) (unintelligible) the same fuckin' deal.

Apker: Well, I wish --

Friend: All day long. (noise in background)

Friend: (unintelligible)

Apker: I just gotta -- I just got tires for the blue one out there, you know. I just got tires for the blue one out there. It was so fuckin' bad.

Friend: Yeah.

Apker: -- and ah, I was s'pose to have the rims and ah --

. . .

Apker: -- somehow they got maneuvered some other way and they lost 'em or

something, you know, couldn't find 'em.

Friend: Uhm-hmm.

Apker: -- ah, you know, they though(t) they had a certain set of rims and they didn't, and so I got the tires and I don't have rims for 'em yet. I'm gonna get some here --

Friend: (unintelligible)

Apker: I wanted ah, those ah, older rallies like in the fuckin' seventies they're comin' in (on Impalas) (unintelligible) of one's that have just the big slot in the side.

Friend: Yeah, with the beauty ring and ah, and the big center thing?

Apker: Yeah, like (a) cone.

Friend: Like sixty-nine ah, Super Sport stuff.

Apker: Yeah, something like that.

Friend: Ah, what (do) you want it for? Your pickup?

Apker: No, I was gonna put 'em on that little van.

Friend: Okay, for (a) Chevy, right?

Apker: Yeah, fifteen inch.

Friend: Fifteen inch. I'll check when I get back.

Apker: See, now the Corvette, they had ah, some, oh, they were like --

Friend: (breathing deeply)

Apker: -- eight inch reverse or somethin' the ones (on the Impalas) (unintelligible) are like six or seven inch ones.

Friend: Right.

Apker: And ah, you know, they were just fuckin' fantastic.

Friend: On the Corvette, I believe it.

Apker: Well, somewhere along the way (unintelligible) ten inch reverse rims, real wide.

Friend: You'll like 'em fuckers. Ah, and then they had your Super Sports that had ah, eight to six with ah, and then they had your stock, your stock ah, didn't have it. Now, the they even ah, regular size rims.

Apker: Yeah, I know how to put (unintelligible), but these are all (unintelligible) they're only s'pose to be like ah, one ninety-fives or two oh fives or somethin' like that, you know, small tires.

Friend: Yeah, two oh rive.

Apker: I think actually they're s'pose to one ninety-five now thin (them) tires that I just got were ah, one ninety ah, the one (uninteliigible)

Friend: That fuckin' Coupe de Ville is suppose to take two oh five.

Apker: Really?

Friend: Yeah, I put -- I put -- I got two thirty-fives on there. They're oversized. That's why the speedometer's off --

Apker: But it ah, but two oh five --

Friend: -- the book but that's what (the book calls for that) -- for that fuckin' Coupe de Ville well -- the seventy-nine Coupe De Ville ah, the road shocks (the one Murph's got) is a little smaller than this one, right?

Apker: Uhm-hmm.

Friend: You know, not to look at 'em (but

when you get to measuring them) (unintelligible) then inch is (ten inches) smaller than that one. Okay?

Apker: Uh-huh.

Friend: And he's a (his) seventy-nine takes a two oh five tires.

Apker: Huh?

Friend: Ah, I got ah, two thirty-fives and that's why my speedometer is off by about ten mile(s) an hour, you know, but ah -- 'cause I couldn't believe that's a two oh five goddamnit and ah --

(excerpts omitted)

Apker: The person would be -- have to be ah, completely fuckin' nuts, really fuckin' crazy ah, ta be out tryin' to make any money sellin' it by the pound, you know.

Friend: Yeah (unintelligible)

Apker: I mean, if you're tryin' to make any money at all, you're sellin' it by the pound ah, you aren't gonna make any money, you know, you gotta sell it in a smaller increment ta even make the (some) money and I wouldn't. There ain't no way I would go and tell (sell) 'em ah, to club member it (if) -- it (if) you don't make any money off them that's got the same deal you do ah, by the pound than anybody else if you can't make money, you can't sell it by the pound 'cause there isn't -- isn't enough there.

Friend: Not in your own town.

Apker: I mean, (not in) your own tow, where

you're tryin' to make money -- oh, yeah, fuck, you can make forty or fifty dollars on a -- on a pound or a couple hundred dollars.

Friend: Yeah, they're takin' a chance of goin' to prison (for it, right?) -- goin' to prison for fifty dollars.

Apker: You know.

Friend: Yeah.

Friend: You know, Gary --

Apker: I didn't think one more (unintelligible) gonna get.

Friend: Gary (unintelligible) too close (unintelligible)

Apker: Yeah.

Friend: Ah (unintelligible) you don't (unintelligible) and so you (unintelligible) and so you (unintelligible) and then (unintelligible) you know and I'm just (unintelligible) I don't know you (unintelligible) I know how they (unintelligible) I know how they (unintelligible) 'cause I don't know if I would (unintelligible) the same thing as everybody else, you know.

Apker: Uhm-hmm.

Friend: All I know is that I know Cal was very upset with Mary and ah, you know he can be over upset ta -- ta start thinkin' (unintelligible) but ah, I would say I (unintelligible)

Friend: (unintelligible) I love you Gary.

Apker: I'm so upset with myself about havin' --

Friend: You left yourself open ta get

susceptible, right?

Apker: Yeah.

Friend: (unintelligible) ain't nobody knows about me anymore better than myself (unintelligible) I'm guilty of it myself of leavin' myself open, you know. I'm just (unintelligible) ta have a good time carrying on (unintelligible) and, at that -- at the point I'm not thinkin' about leavin' myself open, 'cause I don't think I'm gonna get caught, but for somebody to want to make it look like I've done somethin' wrong, hey, sure (unintelligible) because (unintelligible) hung just because (unintelligible) ta start (with), follow me?

Apker: Uhm-hmm.

Friend: All right.

Apker: I'm not ah --

Friend: (unintelligible)

Apker: Yeah (unintelligible)

Friend: (unintelligible)

Apker: (unintelligible) make you feel so fuckin' stupid somethin' you tell everybody else, now, don't let these people, you know, get out in front of ya and watch 'em all the time and all this --

Friend: (unintelligible)

Apker: -- but I tell everyone there is that -- that shit and then --

Friend: Then you fall prey, you fall victim to the same (fuckin') thing you been preachin' about, right?

Apker: Yeah.

Apker: Yeah.

Friend: But, hey, we're all -- we all are creatures, but it's --

Apker: You know, it's such ah --

Friend: (unintelligible)

Apker: -- you know, it's such an easy deal ta square up, you know, but it just ah -- you just can't do too much and expect to have perfection in everything.

Friend: (unintelligible) do too much or do ah -- (not) too much, but to do --

Friend: too quickly, you know what I mean, just (unintelligible) you (know), you trust this person, they're here for a long -- Gary, I got things to do, I'll talk to you later, and not check(ing) on them.

Apker: In a hurry, you try to help other people out and just -- the other brothers out ta keep them from, you know, so they can have money ah, so you cut your ownself short ah, on time -- ta hurry up and run back and forth ta try to make sure everyone else is gonna do okay 'cause you worry (you're worried) about everyone else survivin' and it gets (you get) so into tryin' ta --

Friend: I gotta get goin' (unintelligible)

Apker: -- you're tryin' to get everyone else survivin' and you end up --

Friend: (unintelligible)

Apker: (unintelligible) the garage door.

Friend: Yeah, (unintelligible) a barbecue.

Apker: Yeah, I mean (unintelligible) --

Apker: it's just one of those --

Friend: I can understand -- I can see (unintelligible) maybe I can see these things 'cause I know that ah (unintelligible) I am -- I am never (unintelligible)

Apker: Uh-huh. I -- you know.

Friend: 'Cause I know I've asked people, you know, if they see somthin' (unintelligible) I was too close to her, but that's all the same stuff. You know, here I am --

Friend: (unintelligible)

(The tape was turned off at this point)